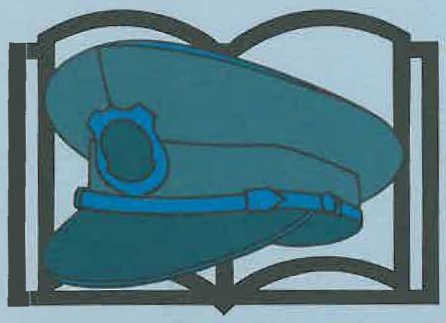

ISSUES OF INTEREST

VOLUME NO. 24

Justice Institute of British Columbia
POLICE ACADEMY
4180 West 4th Avenue, Vancouver, British Columbia, V6R 4J5

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Written by John M. Post

September 1986

TABLE OF CONTENTS

INDEPENDENCE OF THE PROVINCIAL JUDICIARY

Valente v. The Queen, 23 C.C.C. (3d) 193
Supreme Court of Canada

Recently the independence of Ontario Justices of the Peace was tested against the Charter of Rights and Freedoms in the High Court of Justice*. That Court found that these members of the judiciary are, in view of matters ancillary to their appointment and employment, not independent within the meaning of s. 11(d) of the Charter which assures the right to be tried by an independent and impartial tribunal. Hence they were prohibited from presiding over trials.

Mr. Valente found himself before an Ontario Provincial Court Judge in respect to the offence of careless driving under the provincial Highway Traffic Act. The Judge declined jurisdiction. He reasoned that in view of his appointment and matters respecting his tenure, remuneration and pension, it should be considered by a superior court if he was too dependent on the executive branch of government (the prosecuting state) to be considered independent.

The provisions of the Ontario provincial Court Act, the Public Service Act and the Public Service Superannuation Act are applicable to Ontario Provincial Court Judges and appear to make them dependent on the cabinet.

For instance:

1. the salary for Provincial Court Judges is at the whim of Cabinet and not the legislature;

2. pensions are restricted or not available under certain circumstances;

3. the Judges are subject to special assignments and appointments by the Cabinet;

4. their documents, notes and papers are subject to rules by the Attorney General;

5. the Deputy Attorney General has powers somewhat akin to management rights in respect to a judge's "employment with the government"; etc.

* Re Currie and Niagara Escarpment Commission, 13 C.C.C. (3d) 35. Also see Volume 19, page 3 of this publication.

It seems to follow that if the executive branch of government has such controls in respect to the welfare and tenure of these judges, they do not appear to be impartial. In criminal proceedings the legal dispute is between the accused and the State. The defence reasoned that the Ontario Provincial Court system was akin to a referee being employed by one of the parties facing one another in a contest.

This question of independence ended up before the Supreme Court of Canada which heard from many provincial intervenants including a judicial association.

The Supreme Court of Canada dealt with the issue in the broadest way. It considered whether one single matter or all employment conditions collectively would cause the Provincial Court Judges in Ontario not to be "independent and impartial". The Court observed that independence and impartiality constitute a dual requirement and emphasized that the one is distinct from the other.

The Courts which decided on this case before it reached the Supreme Court of Canada had applied a test known as "reasonable apprehension of bias". That test is aimed to determine impartiality, but does it meet the needs to test independence? The Supreme Court of Canada said:

> "Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial"... connotes absence of bias, actual or perceived".

In regards to the word "independent" the Court said:

> "... (it) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of Government that rests on objective conditions or guarantees".

The Supreme Court of Canada reviewed the historical need for impartiality and independence in relation to the political governing bodies. By quoting from international committee reports the Court also associated itself with opinions that impartiality and independence must include separation from corporate giants which in these modern days grow nationally and internationally. Entanglement with the political scene and with financial, corporate and business interests will contaminate the necessary attributes prerequisite to the judicial function in a free and democratic society. This test must not only be applied to the judiciary as individuals but also the "institutional relationships". That means the working conditions of the judges and

the conditions affecting the administration of the court to which the judge is appointed, which includes the administrative relationship between that Court and the executive branch of government. In other words, if the institution is not independent then neither are the persons presiding over its proceedings. In addition, the Supreme Court of Canada, said that even if the individual judge is clear of political and business entanglements, and his working conditions and his court meet all requisites to independence, then what can also cause a judge not to be "impartial or independent" is "... how a tribunal will actually act in a particular adjudication, and a tribunal that does not act in an independent manner cannot be held independent within the meaning of s. 11(d) of the Charter..."

Finally, the Court reminded that apparent and actual impartiality are of equal importance. Said the Court:

> "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case, but also to individual and public confidence in the administration of justice". (Emphasis is mine)

There is no doubt that the Constitution Act (which includes the Charter of Rights and Freedoms) has substantially increased judicial power. The Courts as constitutional referees, have for instance power to declare legislation "without force or effect". By means of constitutional assignments in addition to the common law function to interpret the law, the courts have gained in their law making function. Consequently the matter of independence and impartiality on the part of our judiciary are now more sensitive and must receive greater attention than they did before. Hence it is advocated by many that considering the many criminal cases concluded in our lower courts, the provisions for superior court judges in sections 99 and 100 of the Constitution Act of 1867 should also apply to the judiciary of our lower courts. These sections provide:

1. tenure of office is during good behaviour (corrupt and criminal behaviour only are justification for removal from office);

2. removal from office can only be "on address of the Senate and House of Commons"; and

3. remunerations, allowances and pensions shall be fixed by Parliament.

The advocates submit that where these sections refer to House of Commons and Parliament, we must for Provincial Court Judges substitute "Provincial Legislative Assemblies".

To determine in this Valente case if the Ontario Provincial Court

Judge was independent and impartial at the time the accused appeared before him in regard to an allegation of careless driving, the Supreme Court of Canada firstly looked at the Judge's tenure and the security of that tenure. The Provincial Court Act of Ontario provided that the Judge could be removed from office only "for misbehaviour or for inability to perform his duties properly".

Such misbehaviour or inability must be determined by a Superior Court Justice by means of an inquiry during which the subject judge has, of course, a right to participate fully. The Superior Justice must then file his report with the Ontario Legislative Assembly. But whatever the recommendations are, the Cabinet is not bound to act on it. Since the impartiality and independence of this provincial court judge was challenged, the Ontario government amended the Provincial Court Act. Now the provincial court judges can only be removed by the Cabinet if:

(a) a complaint has been lodged with the Judicial Council;
(b) a judicial inquiry has been made and results in a recommendation of removal; and, in addition,
(c) an address of the Legislative Assembly.

The Supreme Court of Canada found that these current provisions are sufficient to provide the necessary security of tenure for a provincial court judge.

The second matter considered was the financial security of the provincial court judge. The wages of the judges and their pensions are established at the whim of the executive branch of government. It was submitted that these matters should be decided by the Legislative Assembly. A further argument was that the judges should get paid directly from the "coffers" and should not be included in the budget of any ministry. The remuneration of provincial court judges are usually included in the budgets of the Attorneys General with the salaries established through Regulations (Orders in Council). The Supreme Court of Canada made an interesting observation when they held that it would be preferable for judges' salaries to be established by the Legislative Assembly. Whether these salaries are established by Regulations or Legislation, in both situations the law would be initiated by the executive branch of government. The only difference would be, that if the salaries would come via the legislative route they would be subject to public debate in the House. Concluding that in the situation in question, the salaries are established by law, the procedure does not raise a reasonable apprehension in regards to impartiality or independence on the part of Ontario provincial court judges.

The third consideration was whether the executive branch of government was involved in the Court's administration to the extent that it affected the independence of the judges. The question was the requisite administrative autonomy by the judges to meet the independence under s. 11 of the Charter. Should the administration include assigning courtrooms; supervision over the quality of the work by court staff; selection and hiring of those personnel; the preparation of budgets for the Courts and all ancillary (including personnel management) matters thereto? No province has given their provincial court judges' such autonomy. Though such autonomy may be desirable it is not essential to meet the standards of independence under the Charter, held the Supreme Court of Canada. The Court also recognized that such institutional autonomy would be riddled with problems and inconsistencies. It found that the institutional independence of the provincial court in Ontario is now adequate to consider the members of the provincial judiciary independent, despite control by the executive branch of government over the salaries of discretionary benefits for judges and control over the management of the support services to the Court.

Accused's appeal was dismissed.

* * * * *

THEFT OF CONFIDENTIAL INFORMATION

Regina v. Offley, Alberta Court of Appeal, April 1986, No. 8503-9075-A.

The accused, a retired policeman, went into private security and investigative work. He was in need of information contained in the national and local police computers. He applied for access to the computers but his request was denied. He then approached a constable in the record section and offered him money for information. The constable reported the offer to his superiors and the accused was set up; the constable supplied information and the accused paid. Consequently he was convicted of counselling the constable to commit theft; and with corruptly paying the constable to procure the offence of theft of information (bribery). He appealed the conviction. Needless to say the sole and kernel question to be decided was whether confidential information is capable of being stolen in terms of theft as defined and made culpable by the Criminal Code of Canada.

A couple of years ago the Ontario Court of Appeal considered in a similar case* if confidential information is capable of being stolen. The Court answered in the affirmative but held that it only amounts to theft when the information is removed or taken so it is not available to the owner any more. Getting access to information only for the purpose of intelligence gathering without depriving the owner of that very information, does not amount to theft. In other words, the Ontario Court of Appeal held that confidential information is "property" as defined in s. 2. C.C. that can be stolen if the owner is deprived of it.

One Ontario Justice had reasoned that taking confidential information causes it to lose its confidentiality and it cannot be left or returned in the condition in which it was when taken. The Justices of the Alberta Court of Appeal in this Offley case did not think such consideration necessary. Classifying information "confidential" is pegging a quality to it. Quality has never been a factor to determine if something is property.

In respect to loss of confidentiality upon the officer giving the accused the information, the Alberta Court observed that the information was never taken away. Furthermore, wondered the Court, does, for instance, revealing a secret entrusted by a friend amount to committing a theft? What about plagerism, violation of copyrights,

* R. v. Stewart 5 C.C.C. (3d) 481

advertently reading a confidential memorandum, etc.? The Court recognized that civil law Courts award injunctions as well as damages in respect to breach of contract or confidence. In business, secrets are valuable and are legally sold and bought. Secrets have commercial value but are not property for the purpose of theft. There may well be civil liability for breaching confidences if there are consequential damages. But there is no criminal liability.

The Alberta Court of Appeal quoted from a text book:

> "It does not assert that appropriating value without appropriating property is theft".

Hence, confidential information is incapable of criminally being stolen.

Accused's appeal allowed.
Conviction quashed.

* * * * *

RIGHT TO COUNSEL WITHOUT DELAY
TIME FOR BREATH TESTS RUNNING OUT

Regina v. Frebowski, County Court of Westminster, No. X016236, New Westminster Registry.

The accused was found driving while he appeared impaired by alcohol. A demand was properly made for samples of his breath and he was told of his right to counsel. Everything happened with dispatch including him being taken to the breathalyzer. Just before the operator was to take the samples the accused made it known that he firstly wished to speak with a lawyer. He was immediately given a phone and privacy. In 10 minutes the accused made several calls and was unsuccessful in contacting a lawyer. For another 13 minutes the officer made four calls on behalf of the accused. The attempts to reach a lawyer were without avail. Considering the statutory time limitations for the tests to be done, there were only a few minutes left to spare; perhaps enough time to make a few more calls. However the technician insisted that the accused complied with the demand made of him. He refused and was convicted accordingly. The accused appealed submitting that not utilizing the few spare minutes to make further attempts to contact a lawyer amounted to an infringement of his right to counsel and gave him a reasonable excuse to refuse.

The accused's counsel argued that although police were very co-operative, allowed him to make a number of calls, and even assisted him, several numbers the accused (as well as the officer) dialed were either "busy" or "no longer in service". The trial judge had not taken this in consideration when he had concluded that the accused had received fair treatment and that therefore his rights had not been infringed.

Defence counsel apparently also made a plea that the Charter is supreme law and supersedes the provisions of the Criminal Code. The two hour time limit for taking breath samples is a legislative provision of an evidentiary shortcut favoring the Crown. It provides for adducing the results of analyses by means of a certificate and allows it to be presumed that the blood alcohol level at the time of analysis is equivalent to that at the time of driving. The accused had to forego his rights granted him by supreme law to accommodate the Crown's evidentiary convenience provided for by ordinary statute law. The accused had not deliberately lingered; his attempts and intent to make contact with a lawyer had been sincere. He should have been permitted to continue those attempts until he had completely exercised his right. If the samples, as a result would have been given outside the two-hour period the Crown would not have been estopped from

prosecuting the accused. It only would have to call the breathalyzer technician to prove the analyses and an expert to prove the blood alcohol level at the time of driving. A citizen should not have to relinquish a constitutional right to make the prosecution process more convenient for the State. (The reasons for judgement are not too clear on this presumed submission by defence counsel. However, what it does contain is sufficient to infer that this was the tenor and drift of his argument).

The County Court Judge held that other cases which appear similar on the surface are distinct from this case. In the others there had been sufficient time left within the two hour period to make further attempts to contact counsel. The time given to the accused was reasonable and the authorities had treated him fairly and in compliance with his rights.

Appeal dismissed.
Conviction upheld.

* * *

Another case similar in circumstances was decided in the same level of Court in respect to Regina v. Willey (No. X016720), New Westminster Registry.

The accused had appealed his conviction for refusing to blow. He was under demand to give breath samples and was made aware of his right to counsel. He requested to make a long distance call to his lawyer. He spoke to his counsel from 1:31 a.m. till 2:04 a.m. He was then asked to hang up as police were running out of time. He continued to speak to his lawyer for another three minutes when another request was made to terminate the call. He complied but told police that since they were short of the prerequisite reasonable and probable grounds, he, on the advice of his lawyer, refused to give any breath samples. At trial and in this appeal he argued that being forced to terminate the phone call after 36 minutes amounted to depriving him of receiving legal advice.

The accused had been given ample time to receive adequate legal advice, held the Court. He acted on that advice and gave reasons. As it turned out the advice was wrong and so was the accused's perception of what his rights to counsel were in the circumstances.

Also that appeal had been dismissed and his conviction upheld.

* * * * *

ARREST OF PASSENGER IN CAR FILLED WITH MARIHUANA SMOKE - UNREASONABLE SEARCH; ARBITRARY DETENTION; AND INFRINGEMENT OF RIGHT TO COUNSEL

Regina v. Guberman, 23 C.C.C. (3d) 406
Manitoba Court of Appeal

The accused was a passenger in a car stopped in a road block to check for impaired drivers. A strong smell of marihuana smoke was detected and after some discussion the driver handed over a bag of marihuana to the officer. The accused was also arrested and informed of his right to counsel. He was promised to be afforded an opportunity to phone counsel as soon as they would get to the police station. However, before allowing the accused to phone, the officers searched him and found marihuana hidden on his person. Immediately after the search he was allowed to call his counsel. The accused was firstly acquitted of the charge of possession of a narcotic. The Crown's appeal was allowed and the accused went to the Manitoba Court of Appeal appealing this reversal of his acquittal.

The grounds for appeal were:

1. The arrest was not based on reasonable and probable grounds and amounted to an arbitrary detention contrary to the accused's right (s. 9 of the Charter);

2. The search by which the narcotics were found was unreasonable and contrary to s. 8 of the Charter;

3. There was a denial of right to counsel in that the search caused delay in contacting a lawyer who could have rendered advice;

AND

4. That the trial judge had erred in admitting the narcotics and the certificate of analysis into evidence despite the infringements of rights by means of which the evidence had been obtained.

The accused reasoned that the officers had acted on mere suspicion. The accused was not known to police and the car he was a passenger in happened to be stopped by police in a road check. The arrest was therefore illegal in that police lacked reasonable and probable grounds in respect to the accused and so was the subsequent search by which the marihuana was found. The police action had been illegal in its entirety claimed the accused, and to seriously consider the weight of evidence obtained by such illegal means would surely bring the administration of justice into disrepute.

The Manitoba Court of Appeal concluded that considering the circumstances, police had the reasonable and probable grounds for believing that the accused had committed or was about to commit an indictable offence. There was marihuana in the car and ample evidence that it was being used. This included grounds for believing it would be used again. The accused's arguments that he could have entered the car after the smoking took place and may, even if he was present, not have been the one who smoked or possessed the contraband, were rejected. Responded the Court:

> "... if police officers were permitted to allow suspects to proceed on their way because of a possibility of innocence (despite their reasonable and probable grounds), few persons guilty of an offence would ever be detected".

(The portion between parenthesis is mine and is necessary to convey the Court's intent apparent from of other passages in the reasons for judgement).

The smell was strong. If the accused entered the vehicle after the smoking took place, then accepting a ride in that vehicle subjected him to the consequences of the conclusion police could draw from that evidence.

The search police conducted was in accordance with authority granted under s. 10(1)(d) N.C.A. The search was not unreasonable in any way.

The accused argued that the search which resulted in finding marihuana on him occurred at a time prior to him receiving the legal advice he had indicated to the officers, he wanted without delay. This means, submitted the accused, that the right to counsel had been infringed when he was searched. Consequently the evidence obtained by that search should have been excluded. The Court reasoned that it would have been entirely proper for police to have searched the accused at the roadside, immediately upon his arrest. In this case, out of courtesy to the accused, he was taken out of inclement weather and public view and then searched at the police station. Nothing had, because of the "change of venue", changed in respect to the police's authority to search the accused. He was not demanded like a suspected impaired driver to produce evidence. He was simply, due to the lawful arrest, a person police have a right to search. Said the Court:

> "There were no options open to the accused upon which he might require the advice of counsel prior to the search... To say otherwise would be to impede the police in the due execution of their duty to investigate in circumstances in which they have reasonable and probable grounds for believing a crime to have been committed."

The Manitoba Court of Appeal concluded that the accused's submissions and claims are inconsistent with the meaning and intent behind the Charter. Furthermore the Justices then seemed to join in with their B. C. counterparts in saying that even if some infringement was involved

> "... the wording of s. 24(2) of the Charter suggests that illegally obtained evidence will continue to be admitted, save in those cases where its admission would bring the administration of justice into disrepute."

Accused's appeal dismissed.

* * * * *

THE REASONS WHY B.C.'S COMPULSORY BLOOD TEST LAW WAS UNCONSTITUTIONAL

Regina v. Chatham and Regina v. Ketola, 23 C.C.C. (3d) 434, British Columbia Supreme Court.

Quite within its legislative purview, the B. C. legislative assembly enacted that where a peace officer has reasonable and probable grounds to believe that a driver (or a person who was driving within the last 2 hours) has consumed alcohol, he may demand of that person to supply a sample of blood for the purpose of analysis.

This law was supposed to catch drivers who were injured or faked injuries when involved in an accident.

There is not too much detail on the circumstances involving the accused Chatham but Ketola was a motorcycle rider who collided with a car and was transported to hospital by ambulance. It was obvious he had been drinking and the investigating officer demanded he give a sample of blood. As a result Ketola was charged with "over 80 mlg." under s. 220.1(1) of the Motor Vehicle Act. Chatman was charged with the same offence. Both were acquitted as the respective trial judges found the compulsory blood test law to be excessive in view of our rights under the Charter. The B. C. Attorney General appealed.

At the outset of his judgement and all through his reasoning the Justice of the B. C. Supreme Court recognized and acknowledged the enormity of the devastation the drinking drivers are causing in society. He indicated to be cognizant that restricting our freedoms to reduce such consequences of adverse behaviour is justified. However, there must be a balance between the severity of the ailment and the side-affects of the medication.

Firstly the Court found that the prerequisite grounds for making the demand is for the police to believe that a driver has consumed alcohol; not the commission of an offence. Also that there is no connection between those grounds and the offence of "over 80 mlg. created in the same section of the Motor Vehicle Act. The one does not even refer to the other. Therefore the provision for the demand is arbitrary. To drink and drive is not an offence, only where it causes impairment or a blood/alcohol level in access of "80 mlg. per 100 milliliters of blood."

Driving is not an offence but speeding is. The blood test legislation is the equivalent of given police authority to demand from every person who operates a car to present proof of the speed of the car. Furthermore s. 220.2(1) M.V.A. does clearly provide that the demand may be made of a person who drove within the last two hours and has

consumed alcohol... just before he drove, yesterday, last year or whenever. The latter, we must assume is a construction error, but the section nevertheless does so provide.

As the section stands, with non-compliance constituting an offence, the demand by a police officer being intimidating and there not being any connection or link between it and any offence, it (the section) provides for an involuntary deprivation of the liberty and security of the person. This is quite in violation of section 7 of the Charter which assures "the right to life, liberty and security of the person". The legislative draftsman did "cast a net" so broad that it ensnares innocent persons in circumstances totally irrelevant to the massive evil of impaired driving which the Crown says was to be curbed by the legislation that allows an assault (taking of blood) upon mere suspicion of a vague fact unconnected with anything. The legislation then creates an offence for the victim for not permitting the assault.

Furthermore the legislation allows an unreasonable search and seizure on account of the lack of any link with an offence. This renders it unjustified under s. 1 of the Charter.

The B. C. Supreme Court held that admission of evidence obtained by the provision of s. 220.1(2) M.V.A. to prove any offence, would bring the administration of justice into disrepute.

Crown's appeal dismissed.
Dismissals upheld.

Comment: When reading the reasons for judgement one is inclined to predict that if the Crown had not appealed by means of stated case, the B. C. Supreme Court would have declared the legislation "without force or effect" under s. 52 of the Charter. The stated case posed specific questions directly related to the reasoning by the trial judges. Probably the Supreme Court was restricted to respond to the narrow question contained in the stated case.

It also is reasonable to infer that the Court is very sympathetic to the apparent objective of the law makers in enacting s. 220.1(2) M.V.A. It seems to suggest that legislation less broad, linked to an offence, with realistic prerequisite grounds to the demand will be considered constitutional.

In December 1985, one month after this decision by the B. C. Supreme Court, section 220.2(1) of the Motor Vehicle Act was amended. Although the following case is in relation to the law as it was before the amendment, the County Court's reasons for judgement delivered in May of 1986, may well apply to practices surrounding the demanding and taking of bloodsamples under the new law.

* * * * *

Regina v. Constantinescu, County Court of Yale, Vernon Registry No. 15231, May 1986.

Prior to the former provisions for the taking of blood samples under s. 220.1 of the B. C. Motor Vehicle Act meeting with constitutional difficulties as explained in the Chatham and Ketola cases above, a police officer demanded from the accused Constantinescu a sample of her blood while she was being attended to in the emergency ward of a hospital. She had been the driver of a car and sustained injuries in an accident. She had been taken by ambulance from the scene to the hospital.

The officer did tell the accused of her right to remain silent and that of access to counsel without delay. The officer conceded to have made the demand for a blood sample to collect evidence for a drinking/driving charge under the Criminal Code of Canada rather than for the offence of "over 80 mlg." under the Motor Vehicle Act. However, he did not inform the accused of that purpose, neither did he make the accused aware that with the exception of breath on demand, no person is obliged to give any sample of a bodily substance for chemical analysis for evidence under the Criminal Code. Evidence that there was a refusal to give such a sample or that it was not taken, is inadmissible. (See s. 237(2) C.C.).

The accused had complied with the officer's demand and was consequently charged with impaired and dangerous driving. The Court had to decide if the evidence resulting from the analysis of the blood was admissible. After all, s. 237(2) C.C. does not render evidence that a sample of a bodily substance was taken or the results of an analysis of that substance inadmissible.

When the officer made the demand for a bloodsample, the enabling legislation had not yet been declared excessive from a constitutional viewpoint by the B. C. superior courts. However, when a law is found to be constitutionally flawed we must consider it to have been so from the date it came into effect and not from the date it was judicially declared to be in some conflict with our supreme law. It then follows that in this case the officer made the demand under law that was unconstitutional from the outset.

That the law was apparently in tact in that the contrary had not yet been decided when the officer made his demand, did have a bearing on the Court dealing with the matter of good faith and the officer's bona fides. After all, s. 237(2) C.C. is silent on the matter of admissibility of the evidence resulting from an analysis of a bodily substance and outside of s. 24(2) of the Charter, the principle that evidence regardless how obtained is admissible, still applies.

Legally then there was no basis for the officer to make the demand for the sample of blood. The provisions of the Motor Vehicle Act under which he made the demand were in conflict with the rights established under s. 7 and 8 of the Charter. Consequently the accused's rights to the security of her person and that rendering her secure against unreasonable search and seizure had been infringed. This triggered consideration under s. 24 of the Charter for exclusion of the evidence resulting from the blood analysis. This left the Court to consider the circumstances (including the matter of good faith on the part of the officer) and whether admission of the evidence would bring the administration of justice into disrepute.

Obviously referring to the officer's intent to use the evidence resulting from the analysis of the accused's blood for charges under the criminal code rather than under the Motor Vehicle Act (despite the fact that she was not obliged to give any sample for that purpose) the Court found that the "demand" had been misleading. Said the Court:

> "The officer, in attempting to do indirectly what he was not entitled to do directly, and without being candid and informing the accused of the true purpose of his demand and the provisions of s. 237(2) of the Code, has shown a certain deviousness, a lack of candor, an unfairness of the pocedure followed, and therefore a lack of bona fides compelling the Court in this instance to rule the blood sample as being inadmissible."

This took care of good faith and "circumstances". As a consequence the admission of the blood evidence would bring the administration of justice into disrepute.

* * * * *

SUSPECT SWALLOWING - JUSTIFICATION OF DETENTION OBTAINING AND ADMISSIBILITY OF EVIDENCE

Regina v. Duman, 23 C.C.C. (3d) 366
Alberta Court of Appeal

In the opinion of the courts, the police officers in this case had a sincere but erroneous belief re continued detention of a person they suspected of having swallowed drugs for the purpose of storage. The accused, whom the officers suspected of having illicit drugs in her possession did, despite the choke hold, swallow something. They took her into custody and informed her of her rights to counsel. The reason for the custody was to keep her detained for up to 30 days so whatever she passed could be seized or for her to go to a hospital to have vomiting induced. The accused was informed of the reason for her arrest and was officially given the choice of the "up to 30 days custody" or up-chuck. She did not make any phone calls but elected to go to the hospital where the drugs she had swallowed were recovered. All of this led to a conviction of possession of a narcotic for the purpose of trafficking. She appealed this conviction to the Alberta Court of Appeal claiming that:

1. her election to go to the hospital and have the narcotics retrieved was induced by misleading and police statements erroneous in respect to the law;

2. her rights to counsel had been infringed as no phone was made available to her; and that

3. her rights to security of her person, not to be arbitrarily detained and to be secure against unreasonable search and seizure had been violated.

All or any one of these matters, the defence claimed, should have resulted in the exclusion in evidence of the retrieved narcotics and the certificate of analysis.

The Alberta Court of Appeal observed that the police officers had a duty to seize and preserve the contraband they had reasonable grounds to believe were in the possession of the accused. Although the law they cited as authority for holding her was erroneous, the actual period the accused had been detained had not extended beyond a period of time the officers were authorized to detain her. Furthermore, there was no evidence that the erroneous quoting of law was done maliciously; there was no evidence of "bad faith".

The case was distinct from R. v. Therens*. There the accused was compelled by law to do something. In this case the law did not require anything from the accused. Therefore the apparent strictness applied by the Supreme Court of Canada in holding that the evidence supporting a "drinking/driving" allegation against Therens must be excluded, did not compel the same consideration in this case.

The accused was an intelligent person. When arrested she was given her rights to counsel and obviously understood them. When she asked immediately upon her arrest if she could talk to a lawyer, she was told she could if that is what she wanted. At the station she did not ask for the use of a phone. Depending on how naive a person is in these matters, it may in some cases be the duty of police to provide a phone whether asked to do so or not. However, the accused was knowledgeable in these matters and not voluntarily providing her with a phone did not infringe her right to counsel.

There simply were no flagrant or overt violations of the accused's rights. But, even if these circumstances had amounted to infringements of her rights, "exclusion of the evidence and not its admission ... would bring the administration of justice into disrepute".

Accused's appeal dismissed.
Conviction upheld.

* * * * *

* Regina v. Therens, 18 C.C.C. (3d) 481 - Page 1, Volume 21 of this publication.

DOES THE NEW PROSTITUTION LAW OFFEND THE FREEDOM OF SPEECH AND THE FREEDOM OF ASSOCIATION?

Regina v. McLean and Regina v. Tremayne - Supreme Court of British Columbia, Vancouver Registry No. CC860492 and CC 860563, May 1986.

The two accused were charged with communication with a person in a public place for the purpose of engaging in prostitution contrary to the recently enacted s. 195.1(1)(c) C.C. Defence counsel challenged the constitutionality of this law and the provincial court judge found that it suffered of "overbreadth" and did therefore violate the Charter. The Crown appealed that decision.

The Chief Justice of the B. C. Supreme Court did preside over these appeal proceedings. From my perspective the tenor of his reasons for judgement is a predominant feature of it. It seems to have a reprimanding tone when it reviews the considerations the defence counsel's arguments had received in the provincial court; it appears to deliver "the message of law" with patriotic and evangelistic vigor. When the words "seem" and "appears to" are used above, I strictly refer to my own impressions of the judgement.

The Chief Justice said that the solicitation practices by prostitutes have associated problems that flow from the "unregulated conduct". In Canada (unlike many other nations) we attempt to control those practices by means of criminal law instead of regulations or by means of enabling legislation so subordinate governments can regulate this historic trade. (This last observation is strictly mine although it is not impossible that the words "unregulated conduct" were, at least, a Freudian slip. In any event, whatever the Chief Justice's opinion may be on the solution to the prostituion problem it would probably have been improper for him to use his judicial response to a narrow question of constitutional law to advocate what elected representatives should do about it.).

The Chief Justice reviewed our previous solicitation laws and said that the results of the welknown Hutt* decision by the Supreme Court of Canada in 1978 had been "disastrous":

> "Prostitutes and pimps were left free to solicit at will, adversely affecting the tranquility and amenities of whole neighbourhoods".

He recognized that police were rendered powerless to control the situation and municipal governments did not have the legislative

* Hutt v. The Queen, 82 D.L.R. 45.

competence to remedy the chaos. He also considered the common law injunction for which the B. C. Attorney General finally petitioned the Supreme Court for, as a "drastic step". It seems the Chief Justice expressed disappointment that the problem required an extraordinary judicial remedy to give an interim relief regarding a public nuisance that should have been resolved by the executive and legislative branches of government.

After having reviewed the history of the soliciting laws, the Chief Justice addressed himself to the legal arguments that had led to the ruling by the provincial court judge that the new s. 195.1(1)(c) C.C. suffered from "overbreadth" and did thereby "constructively violate" s. 2(b) of the Charter (freedom of expression). The provincial court judge had struck down the words "or in any manner communicates or attempts to communicate with any person" in the section which, of course, removed the teeth from this law and left it a lame duck in regard to its objective (the authority for this can be found in s. 52(1) of the Charter).

The Chief Justice did not understand what a "constructive" breach means - "Either there is a breach or there is not" he said. Furthermore the provincial court judge had applied the U.S. "overbreadth" principle, which is not known to Canadian law.

The Chief Justice indicated that the Provincial Court Judge should have followed the procedure established by the Supreme Court of Canada in February of this year when it went through a similar exercise to determine the validity of legislation*. A Court must first determine whether the law in question violates the Charter. Only if it does then that Court must determine if that inconsistency with the Charter is "demonstrably jutified in a free and democratic society". If it is not so justified then the Court may declare the law, insofar as it is inconsistent with the Charter, without force or effect (s. 1 and 52 of the Charter respectively).

Defence counsel submitted to the B. C. Supreme Court that s. 195.1(1)(1)(c) C.C. offends the freedom of speech and the freedom of association in that it prohibits a prostitute (a trade not prohibited by law) to speak freely "with respect to offering and accepting sex for money" and the prostitute's freedom to associate with the customers of her legal trade.

The Chief Justice responded that our speech is controlled in many other areas of communications. One cannot holler "Fire" in a crowded theatre; we are not to swear or use obscene language in a public place; we may not threaten anyone; our communication is very much subject to laws of libel and slander; etc. Defence counsel had argued that all of those restrictions on communications are to prevent a harm

* Regina v. Oakes - See Volume 23, page 16 of this publication.

where solicitation creates no harm. Said the Chief Justice in response: "the submission is simplistic in its approach". Many people who do not want to be solicited, are, and they are offended to be approached by someone "seeking to purchase sex". In regard to the enshrined freedom of speech, the Court said that to include soliciting for the purpose of sex in that constitutional principle is to demean its grant concept as it does not advance any social value. Furthermore the section in question does not in principle prohibit the words that are spoken, but the conduct of the soliciting prostitute.

Defence counsel also argued that the section was too vague. "Far reaching it may be, but vague it is not" replied the Court. Many conducts will be brought before the Courts which will have to determine if it is caught by the section. There is nothing in this section that is different from others in that regard; it simply is a function of the Judiciary.

Crown's appeal was allowed and the cases were referred back to the Provincial Court for continuation of the trials.

* * * * *

FORGERY - BELIEVING TO HAVE AUTHORIZATION TO ENDORSE A CHEQUE

Regina v. Borland, County Court of Cariboo, Fort St. John No. 2272, April 1986.

The accused had endorsed a family allowance cheque made out to a woman he used to live with. The accused endorsed the woman's as well as his own name to the cheque (in the sum of $31.27). He received the cash and used the money on himself.

The accused, in his defence, claimed that he thought he had the woman's consent or at least, was honestly mistaken about such consent. He relied on a case decided by the Saskatchewan Court of Appeal* which said that endorsing another person's name to a document is not criminal forgery if there is evidence that the endorsement was authorized. The accused claimed that when he lived with the payee, all moneys were pooled and it was then condoned that he signed and cashed cheques of this kind. Therefore there was implied authorization that made the forgery not a culpable act.

The Crown showed how the accused and the payee had separated a month before the cheque arrived in the mail. The accused had stolen the cheque from the woman's mail box. Furthermore, if the accused sincerely believed to have been authorized to endorse the cheque as he did, why would he (as he claimed he did) have looked for the payee for an hour to get the consent to cash the cheque. He had apparently gone ahead when he could not find her. This was totally inconsistent with an honest belief of consent.

Accused convicted.

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* R. v. Cechane, 20 C.C.C. (2d) 542.

FRAUD - FORGERY AND POSSESSION OF STOLEN PROPERTY BY CASHING STOLEN CANADA SAVINGS BONDS

Regina v. Fraser, County Court of Westminster, New Westminster, B. C., No. X015445, May 1986.

Fifty thousand dollars worth of Canadian Savings Bonds were stolen from an elderly Mrs C. in Victoria. The prostitute he went to, in turn stole the bonds from him. Not being familiar how to cash savings bonds the prostitute obtained the accused's name through an acquaintance as someone who could assist her. In the company of the prostitute and one of her professional colleagues, the accused cashed the bonds at two or more banks in Vancouver. The prostitute signed Mrs. C's name to the bonds.

Consequently the accused and the prostitute were charged with several counts of fraud, forgery and possession of stolen property. The prostitute entered pleas of guilty but the accused opted for the Crown to prove his guilt.

The defence insisted that the accused was made to believe that the prostitute had earned a large amount of money in her trade which she invested in bonds under the false name of "Mrs. Margaret C". He had done what he could to make sure the bonds were not stolen by having a friend (deceased by the time of trial) check at the bank if the bonds were listed as stolen. For his assistance he had received as per arrangement, 15% of the value of the bonds. He explained that cashing the bonds in the Vancouver area instead of Victoria was all part of a claimed tax fraud the prostitute was perpetrating. He did not know the details of the scam but she had insisted that the cashing-in was to be done in Vancouver for that reason.

The Crown adduced evidence from the person who approached the accused for his services, that he was told the bonds were "hot", and that they had been stolen from a "trick". It was also shown that the accused had in preparation for the cashing of the bonds, arranged for identification for the prostitute in the name of "Margaret C". He had even arranged the incorporation of a company to accommodate this deception.

The credibility of the Crown witnesses had left something to be desired. Consequently defence counsel argued that if the accused was tried by a jury it would have to be instructed that the accused's explanation was capable of creating a reasonable doubt as it might reasonably be true. The accused's defence was also one of "mistake of fact". He had simply believed in a set of facts which, if true, would make his actions innocent ones. Doubt about him having had such an honest belief would have to be resolved in his favor. Furthermore the belief need not be reasonable. An honest belief simply negates any criminal intent.

The Court responded by saying:

> "The threshold question of whether the evidence conveys a sense of reality to the assertion that an accused was acting under a mistaken belief, is distinct from the question of whether the accused's mistaken belief is reasonable or not."

In other words the mistaken belief in fact needs to have an air of reality to it. The reasons for judgement by the Supreme Court of Canada in the well-known Papajohn* case indicate that an air of reality must exist to establish the mistaken belief. Papajohn was tried for rape and consent became the kernel issue. He said that he honestly believed the complainant consented; she said there simply was no consent. The Court had held that assertions of mistaken belief must be supported by sources other than the accused to give it "an air of reality". If this was not so, a simple assertion that there was such belief regardless how bizarre in the circumstances, would provide a defence.

The accused was labelled as a "scoundrel". He had lied to the banks, police, and the Court. However, the evidence of the Crown was full of inconsistencies and holes. The credibility of the prostitutes and their friends was such that very few facts could be found or inferred.

The accused's surreptitious activities were as consistent with what was alleged against him as what it was with the tax scam he claimed the prostitute was perpetrating. Therefore the Court had no alternative but to acquit the accused on all counts.

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* Papajohn v. The Queen (1980 52 C.C.C. (2d) 481.

MEANING OF "OTHER FRAUDULENT MEANS"

Regina v. Bruton, County Court of Westminster, No. 15324 Chilliwack, B.C., January 1986

An 83 year old widow who had "failed recently" in terms of health and memory, testified how the accused (who lived in the same apartment building as she did) had socially forced himself on her. The approach by the accused who experienced considerable financial difficulties and an alcohol problem, was one of "a foot in the door" from a figurative and literal viewpoint. He treated the widow gentlemanly and they visited back and forth. The widow could not recall details, but said that the accused was continuously asking her for money without saying for what it was to be used. Neither was there any understanding with the accused about repayment. The elderly woman issued within two months cheques payable to the accused in the aggregate sum of approximately $18,000. He had asked and she gave. There was no threat of any kind and the woman's claims that the accused at one time, had confined her in his apartment was rejected by the Court. What the Court did accept was her claim that the accused was troublesome.

The accused had lived lavishly off the money. He generously bought drinks for everyone in the house when visiting bars; he tipped a taxi driver several hundred dollars, etc.. When asked about the origin of the money he told how he had won it in a lottery.

The accused was charged with having defrauded the elderly woman "by deceit, falsehood or other fraudulent means", of monies in excess of $200. In view of the fact that there was no evidence of falsehood or deceit on the part of the accused, his guilt or innocence hinged on the meaning of "other fraudulent means". In other words, were the means by which the accused obtained the money from the woman fraudulent?

To determine the answer the Court turned to a leading case* decided by the Supreme Court of Canada as well as articles and court decisions that resulted from that case. Our highest Court had held that "other fraudulent means" include means which are not in the nature of falsehood and deceit. Needless to say that those means by which a victim has been deprived of property, must be dishonest. Deprivation is proven when the Crown has shown "detriment, prejudice or risk of prejudice to the economic interests of the victim". In short, to prove fraud by means other than falsehood and deceit, the Crown must establish dishonest deprivation. In respect to dishonesty the Court held that it was a standard of conduct which is "discreditable as being at variance with straight forward or honourable dealings".

* R. v. Olan, Hudson & Hartnett, 41 C.C.C. (2nd) 145.

The accused Bruton argued that there was no falsehood, no deceit or dishonesty on his part in his dealings with the woman. His lies as to the origin of the wads of bills he produced on various occasions had no bearing on the obtaining of the funds he argued. He simply told his widowed neighbour, "I have no money, I need and want some: and she obliged him" submitted his counsel.

The Court applied the current standard of honesty among ordinary decent people and concluded that the victim was deprived of money by means belonging to the category of cunning. By current standards, considering all circumstances, what the accused did was dishonest.

Accused convicted of fraud.

* * * * *

DO UNTRUE STATEMENTS OF FACTS IN AN INFORMATION UPON WHICH A SEARCH WARRANT IS ISSUED, RENDER SUBSEQUENT SEARCH AND SEIZURE UNREASONABLE?

Regina v. Sismey, County Court of Yale, July 1984*, Penticton 73/84

Policeman A told policeman B how he had learned by means of judicially authorized interceptions of private communications and an informer, that the accused was trafficking in marihuana and/or cocaine.

Policeman B, on the request of A, appeared before a Justice of the Peace and swore an information worded in the first person, in that the information stated that B. had intercepted the private communication and that he had received "reliable informaton" about the accused's trafficking. What complicated matters further is that according to the trial judge, Policeman A had given too liberal an interpretation to the information he had. As a matter of fact the Court said that it had been shown that the information A gave to B was so inaccurate that the former had demonstrated a callous indifference and contempt for what is right. The Justice of the Peace discretionary function had been usurped by means of the inaccurate sworn information upon which he issued a search warrant.

Officer B executed the warrant and searched the accused's home. Ten grams of cocaine were found and the accused was charged with "possession for the purpose of trafficking" and was tried in County Court.

In pre-Charter times, facts like these would not likely have affected the evidence obtained by the warrant. The issuance of a warrant is a judicial act and if the process was flawed in any way the accused would have to apply in separate proceedings to have the warrant quashed. It would not have been for the trial judge to review another judicial process. In other words, a trial judge, would not have been able to go behind the search warrant.

In this case defence counsel persuaded the trial judge that he had an obligation to determine if the search of the accused's home was reasonable. If it was not, then he would have to consider whether the evidence should be excluded in compliance with section 24(2) of the Charter. A search resulting from a sworn statement that is inaccurate is hardly reasonable argued the accused's counsel. The County Court observed that going beyond the warrant to determine the reasonableness of the search is unqiue, but agreed that our Charter makes this necessary to determine admissibility of evidence resulting from the warrant. The judge then conducted a voir dire to make these

* This decision came to my attention only recently. It seemed of sufficient interest to pass it on.

determinations and allowed defence counsel to challenge the information upon which the warrant was issued.

It was found as a fact that Officer B had no direct or personal knowledge of the information he swore to. Neither did he make any attempt to verify some of the things A told him. It was further found that to say the least, the information was a highly inflationary interpretation of the intercepted communication and the so-called unidentified informant was considered totally unreliable by police as well as the court.

In civil law ex parte injunctions are granted by the Courts. Any inaccuracy in the information upon which the injunction is issued will void it. A search warrant results also from an ex parte procedure and the Court agreed that in view of the invasion of privacy that results, it also should be considered void if the information upon which it was issued is inaccurate. That, of course, renders the search warrantless and ipso facto unreasonable*.

The officers "got carried away in the exercise of their duties" said the Court and "broke the principles of good faith, full disclosure and honesty". If the Justice of the Peace had known the facts as they were, he would possibly not have issued the warrant. The Court allowed defence counsel to prove that fact, and concluded:

> "To hold that his warrant is valid and the search reasonable would in my judgement make a mockery of section 8 of the Charter of Rights and Freedoms, and indeed of the present day concept of justice".

The Court held that the warrant was void and the search for and the seizure of the cocaine unreasonable. Furthermore, particularly in view of the facts surrounding the information upon which the warrant was issued, the Court found that admitting the evidence obtained thereby would bring the administration of justice into disrepute. The evidence was therefore excluded. Closing his reasons for judgement with:

> ". . . law and justice and credibility are based upon truth, they are destroyed by untruth and deception and that would be distruction that must not be allowed to happen where it is seen and can be prevented"

the Judge acquitted the accused.

Comment: This case is indeed unique in view of the principles surrounding judicial reviews. When one member of the judiciary sits

* See Hunter v. Southam Inc. Volume 18, Page 12 of this publication.

in judgement over matters decided by another member, then there better be a provision in law that authorizes that. If the accused in this case had wanted to render the search conducted by police a warrantless search for the purpose of determining the admissibility of its yield, the accused should have sought to have the warrant quashed by means of motion in a Court of superior jurisdiction. Judicially issued documents are traditionally considered valid and can only be invalidated by means of review procedure provided for by law.

In this case the Court commented that the Justice of the Peace who granted the warrant had been given information that amounted to ample evidence to be satisfied that the informant (the officer) had reasonable and probable grounds for believing that illegal drugs were in the accused's home. The application of course was done in the absence of the accused who, at his trial, had the first opportunity to challenge the credibility of the applicant. In other words the trial judge did something the Justice of the Peace was unable to do, i.e., permit a probing in an adversary setting of the accuracy of the information. Perhaps one could argue that the trial judge was therefore not reviewing the judicial discretion exercised by the Justice of the Peace. If the trial judge had held that the information was inadequate to "satisfy" the Justice of the Peace of the reasonable and probable grounds prerequisite to the issuance of the warrant, then he would have reviewed the process involving the Justice of the Peace. That would probably have amounted to an unauthorized judicial review.

The principle that judicially issued documents are valid on their face stems from the confidence we must have in our process. We recruited our judiciary from the human race which is not known for its infallibility. Therefore, reviews are not only desirable but essential. However, it cannot be applied randomly but must be in accordance with the rules and laws surrounding judicial law making (stare decisis). Court decisions are precedents and can in our system become law (common law). Surely that system is already flawed by unavoidable long periods of not knowing the meaning of constitutional or statutory provisions. We ought not to complicate this with unauthorized judicial reviews.

As is clear, there are various views one could take of what happened in the trial of Mr. Sismey and it will be interesting what this decision will lead to.

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POSSESSION OF A WEAPON FOR A PURPOSE DANGEROUS TO THE PUBLIC PEACE - SUFFICIENCY OF EVIDENCE RE INTENT TO USE LEGAL KNIFE AS A WEAPON

Regina v. Bellamy, County Court of Yale, Vernon, B. C., Registry No. 13930, October 1985.

The accused, a farmhand, purchased a butterfly knife after checking with police if possessing the knife was legal. The court agreed that there was nothing in law that prohibited owning or carrying the knife, which was not designed to be used as a weapon. Therefore only the accused's intent could in law convert the knife into a weapon.

In accordance with the Crown's allegation, in the early morning hours of the day on which the accused used or intended to use his butterfly knife as a weapon for a purpose dangerous to the public peace, the accused was in a car which was passing a group of youths walking along the curb. Someone from this group yelled something at the accused and the car was immediately stopped in the center lane of the road. The accused (knife in hand) approached the group of youths. He had not noticed that a police car had also stopped and before the accused reached the curb he was challenged by a police officer. The accused was obviously surprised at the presence of police and immediately discarded the knife he had been carrying with open blade by his side in a down position. When asked what he was doing with the knife he answered that he did not like to be called names. To the question: "Were you trying to scare the hell out of those kids?" the accused responded: "I guess so".

The Court found that in the circumstances the knife had not yet become a weapon.

> "If the officer had not arrived at that particular moment, the accused may have crossed the line of forming a sufficient intention to use the knife as a weapon and for an unlawful purpose".

Accused acquitted.

Comment: It seems that when a person arms himself (which the accused did by baring the knife) and aggressively approaches a group of people for the purpose of retaliation (what else can a reasonable person infer in these circumstances) that ought to be sufficient evidence to

* Regina v. Flack, 65 W.W.R. 35.

find the intent necessary for the conversion of the knife into a weapon. The actions of the accused seemed beyond unpremeditated use of the knife out of sudden anger or annoyance. The description of his attitude when intercepted by the police officer was not the demeanor of a person who on the sudden due to insult or other aggravation resorted in anger to aggression. If circumstances as these are insufficient to infer that the knife was a weapon and that the accused's possession of it was dangerous to the public peace, the section is a legislative tiger with dental problems.

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POLICE ATTENDING TO NOISE COMPLAINT - FOUND MARIHUANA BY MEANS OF SEARCH OF APARTMENT - ADMISSIBILITY OF EVIDENCE

Regina v. Cain, County Court of Vancouver, Vancouver Registry No. CC851770, February 1986.

The accused was tried for cultivating marihuana and the admissibility of the evidence became subject to a voir dire.

Police attended to a noise complaint at the accused's apartment at 3:30 in the morning. Five constables were taken to the apartment by the building manager, who was not the complainant and apparently unaware of any noise in the building.

When the group reached the apartment, there was either no noise or it had quieted down. The officer seemingly in charge of the group could not recall which was the case. He testified how the accused had said words to the effect that there was nothing going on in his apartment and that the officers should come in and look for themselves. As the officer considered it best not to charge in the first instance but to speak to the guests at a noisy party he had with two other constables, followed up on the accused's invitation. One of the constables had gone into the kitchen area and had felt heat. As he thought there may have been a fire starting he went to the origin of the heat. In a closet he found a 1000 watt light bulb encouraging potted marihuana plants to do their natural best to sprout. The accused had admitted the plants were his and he was arrested.

It is obvious that the County Court Judge did not believe the officers. In respect to the accused's invitation for them to come in and see for themselves the judge said: "I am not satisfied that the accused did utter those words or any others which could be construed as an invitation to the police to enter".

The Court had believed the building manager who had given his evidence quietly, detached and straight forward. He testified that the accused was intoxicated, "hollering" and belligerent. He had stood in his doorway obviously barring entry to his apartment. He had said: "You can't come in here unless you have a warrant". He had asked: "You don't have a search warrant?" and one of the constables had said, "Yes we do" and with that three of the five officers had just walked in. As they went through, the accused had lowered his arm so there was no shoving.

When the plants were found, the accused was handcuffed and at one time made to lay on his stomach on the floor. He testified that when he was taken in the elevator in the police building to the booking area he was beaten and kicked. His evidence was corroborated by a physician who said the accused had two fractured ribs at the "lower" chest wall. The accused had complained right away. A nurse had "briefly" examined him and she said that pressure she had applied to the "upper" rib cage had not evoked any pain.

The Court found that the broken ribs had been sustained after the arrest and before being booked at the jail as a result of police action. The Court also found the police officers not recalling pertinent matters as incredible.

The Court held that there was a direct link between the illegal entry of the apartment and the seizure of the marihuana plants. There was no such link between the discovery of the evidence and the treatment the accused received after the arrest was effected. However, that behaviour reflected on their actions entering and searching the apartment.

The accused's rights had clearly been infringed. His hostile and improper attitude had not justified the ation on the part of police. The Court held that the administration of justice would indeed be brought into disrepute if the marihuana plants were admitted into evidence.

Evidence excluded.

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TAKING OF BLOOD SAMPLE WITHOUT STATUTORY AUTHORITY ADMISSIBILITY OF ANALYSIS EVIDENCE TO SUPPORT CRIMINAL NEGLIGENT DRIVING CAUSING DEATH

Regina v. John, B. C. Court of Appeal, Vancouver Registry CA002573, May 1986.

The accused drove at high speed into an intersection. He failed to comply with a stopsign, collided with another motor vehicle, and struck a house situated on one of the corners of the intersection. A passenger in the car the accused collided with was killed.

Police had found the accused unconscious a short distance from his vehicle. He had a strong smell of alcoholic drink on his breath and was surrounded by beer bottles including an opened one. When police attended at the emergency ward of the hospital a doctor was in the process of taking blood from the accused for "medical purposes". The accused was still in an unconscious state. Without referring to any statute or authorization the officer asked the doctor to take some blood for him. The doctor, without being told anything by police that substantiated his belief that it was his duty to co-operate in these circumstances, did comply with the officer's request. The doctor had thought that the B. C. Motor Vehicle Act required him to so comply.

The accused was acquitted of Criminal Negligent Driving Causing Death, Dangerous Driving, Impaired Driving and "over 80 mlg.". The Crown appealed.

The trial judge had held that the analysis of the bloodsample was inadmissible as the taking of the blood had amounted to an unreasonable search contrary to s. 8 of the Charter.

The court had also held that an I.C.B.C. insurance adjuster who was called by the Crown to relate some of the conversation she had with the accused was "a person in authority". She had not warned the accused in respect to his right to remain silent and the statements were held to be given involuntarily and therefore inadmissible in evidence.

In respect to the taking of the blood sample, the Crown conceded that it had been done illegally, but submitted that it was not unreasonable. The officer had ample grounds for believing that the accused was impaired by alcohol and that this had significant bearing on the serious accident the accused was involved in. The accused's right had been reasonably interfered with to afford and secure efficient law enforcement. Needless to say, defence counsel argued that the seizure of the blood had been both illegal and unreasonable.

The B. C. Court of Appeal found in favour of the Crown. It quoted from many other cases which were very similar in circumstances to this John case, including several decided by the U. S. Supreme Court. In relation to the unreasonable seizure of the blood the B. C. Court of Appeal relied on the Supreme Court of Canada decision in Hunter v. Southam*. Quoting from the reasons for judgement the Court concluded that s. 8 of the Charter only protects a "reasonable expectation" of privacy.

> "... as to whether in a particular situation the public interest is being left alone by government must give away to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement".

In relation to the I.C.B.C. adjuster being a person in authority, the trial judge was clearly wrong, held the B. C. Court of Appeal. For any person (other than those automatically considered a person in authority if the accused knows what their position is such as police officers, prison personnel, prosecutors) to be a person in authority he must, in the mind of the accused, be a person who may effect the path of prosecution. In other words the Courts must apply a subjective test. The accused did not testify in the voir dire to determine the admissibility of the statement he made to the adjuster nor did he call any witnesses to say he had considered her a person in authority.

For these reasons the B. C. Court of Appeal

> allowed the Crown's appeal and ordered a new trial.

Comment: The B. C. Court of Appeal referred several times to a search warrant to obtain blood. It considered what had motivated the officer to proceed without a warrant and it was presumed that the urgency was to stay within the two hour limit from the time of driving. This, no doubt, is due to the provision in s. 237(1) (c.1) C.C. which provides that the results of an analysis of blood taken within 2 hours of driving is proof of the blood alcohol level at the time of driving. Also, the U. S. cases refer to search warrants to get blood samples taken from a suspect.

Firstly one wonders if in Canada a search warrant can be granted for this purpose and if the provisions of s. 237(1)(c.1) C.C. would justify a warrantless search. The section does not say that the results of an analysis of blood is only admissible if it was taken

* See Volume 18, page 12 of this publication.

within two hours of driving. The section seems simply to provide a presumption of equalization of blood alcohol levels at the time of driving and the time the blood was taken rather than an exhaustive means to have such analysis admitted in evidence. Section 237(1)(b) provides for such admissibility. If the analysis is admissible an expert could testify to the alcohol level of the suspect at the time of driving if more than two hours passed between driving and the taking of the sample.

This then leaves the interesting question if a warrant can be granted for a person's body. In the U. S. the Federal Crime Rules are quite specific on this in that they provide that search warrants can be granted for "persons and places". Our B. C. Court of Appeal did not deal with this issue and only commented that the search of the accused was warrantless. However, there is a very interesting Canadian case* on this question of law.

A Mr. Laporte was arrested for an unmentioned offence. It was noticed that he had a scar in the back of his neck that resembled a bullet wound. Laporte was also a suspect in an armed robbery that occurred some time ago which resulted in a shoot-out with police. All perpetrators got away but one had been wounded. (The reason for Laporte's arrest was totally unrelated to the robbery). An X-ray showed an object in Laporte's neck which resembled a .38 calibre slug. An officer was granted a search warrant for the person of Laporte made out for two named officers to execute. A ballistics test could connect Laporte with the robbery. Laporte immediately petitioned the Quebec Queen's Bench to quash the warrant. Execution was postponed until the Court could rule on the petition which challenged the validity of the warrant. Another problem was the reluctance if not refusal on the part of surgeons to operate, despite the warrant, on a non-consenting patient for the sole purpose of collecting evidence. For that reason the College of Physicians and Surgeons was represented before the Queen's Bench. The issues raised and the Court's responses are interesting and as follows in point form:

1. The warrant stipulated that it was only valid on condition that the surgery would not be dangerous to Laporte's life. The medical witness had testified that all surgery was dangerous but that the procedure necessary to remove the slugs was "simple" and "not serious". The Court responded that the danger to Laporte mentioned in the warrant went beyond the danger the surgeon contended is involved in all surgery.

2. The warrant should have been addressed to a surgeon and not to police officers. The latter were incapable of executing it. The Court responded that the surgeon was no more than what a locksmith would be if police needed his expertise to gain access to premises or a vault.

* Re LaPorte and The Queen, 8 C.C.C. (2d) 343 (1972).

3. Laporte argued that the warrant violated the Bill of Rights (1960) in that he was being subjected to cruel and unusual punishment. The Court responded that he was not being punished. Furthermore that the warrant, although unusual, did not impose anything cruel. Hundreds of citizens undergo surgery every day.

4. The surgeons argued that the surgery would be unnecessary from a medical prospective, unethical and amount to an assault. The Court rejected these arguments and held that the surgeon like any other person would be protected under s. 25 C.C.. He would do no more than what he is authorized to do in the administration or the enforcement of the law.

5. The Crown cited a number of U.S. cases where warrants for persons were issued (some are the same as those cited by the B. C. Court of Appeal) and observed that the prerequisite grounds for such warrants were the same as here.

   The Court disagreed with Crown Counsel and pointed out that the U. S. Federal Crime Rules and State laws specifically provide for warrants for persons. Our Criminal Code only provides for search warrants for "buildings receptacles and places". (s. 443(1) C.C.).

   The human body is not a building, neither is it a "place". The Interpretation Act dictates that a word must receive corresponding and consistent interpretation. The word "place", in statutes, always refers to a geographical rather than an anatomical location. A person cannot be considered to be a receptacle either, although it can be a living thing for the display of any article or thing.

The Court did apparently give some credit to the defence argument that the search warrant was totally unrelated to the matter for which Laporte was in custody. Although the Court did not say so, it vaguely implied that the warrant amounted to a fishing licence. In the B. C. case of R. v. John there was a definite link between the accused, his condition and the accident. Perhaps in the Laporte case there was no firm link between the scar on his neck and the bank robbery.

In any event, the Quebec Queen's Bench quashed the warrant as there was no statutory or common law provision for a search warrant in relation to a person. Section 443.(1) C.C. still does only provide for warrants for buildings, receptacles and places.

It may be of interest that warrantless searches of persons for samples of blood have not done badly in our Courts in respect to the admission of the resulting evidence. The Courts are so far holding that an unlawful search is not necessarily unreasonable. However, the burden in such case (as it is with all warrantless searches) is on the Crown to show the search was reasonable.

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WAIVING OF A CONSTITUTIONAL RIGHT BY INTOXICATED MURDER SUSPECT - "AWARENESS OF CONSEQUENCES" TEST

Clarkson v. The Queen, Supreme Court of Canada, April 1986.

Lorna Clarkson, the accused, phoned her sister in early morning hours to say that she just shot her husband (or "that someone shot him" suggested defence counsel in cross-examination). Several family members attended at the accused's home and police were called in. The officers found the accused in an hysterical state and seemingly intoxicated. She was arrested for murder and told of her right to remain silent and to counsel. She was then taken to hospital in the company of her aunt. The conversation in the car between the two women was quite inculpatory as the accused made admissions of guilt. These as well as other conversations at the hospital and casual remarks by the accused were all ruled inadmissible in evidence at her trial.

At the police station the accused was again told of her rights and she said she understood her options. She consented to have the police interview sound recorded and frankly answered questions put to her. Her aunt was present during all of this. She had expressed concern to the officers and asked if it was proper for them to question her niece without a lawyer present. The officers explained how the accused could have one if she wanted to and how she was made aware of this. The aunt tried to pursuade the accused to get a lawyer and attempted to stop the interview. The accused replied that there was "no point" and that she did not need or want a lawyer. The statement she gave supplied the Crown with a confession which the trial judge would not allow to be admitted in evidence. He held that, due to the accused's condition her words were not her statement as she failed to comprehend what she was saying. The New Brunswick Court of Appeal allowed the Crown's appeal and held that the admissibility did not depend on the accused appreciating the possible consequences of what she was saying but whether she made her statement with "an operating mind". Her mind had been, despite her intoxication, sufficiently functional to give probative value to her words.

The accused then took her plight to the Supreme Court of Canada.

In relation to the admissibility of the statements made by the accused, the Supreme Court of Canada observed that the different views expressed by the trial judge and the New Brunswick Court of Appeal reflect the conflicting lines of reasoning recorded in our case law on this topic. By holding that an accused must be aware of the conse-

quences of what he or she says for the statement to be admissible, the trial judge is applying the principle of "adjudicative fairness". The Court of Appeal had applied the "operating mind" principle which basically only requires awareness on the part of the accused what he or she is saying and not necessarily knowledge of consequences. This conflict is similar to the argument surrounding the acceptance of evidence when it is known to be the truth; or adjudicating the fairness of the means by which the facts became known to determine the acceptance of those facts. In this case, one could consider taking advantage of the accused's state of sobriety (causing her possibly not to appreciate what was at stake) as being unfair while what she consciously said had probative value to determine the truth, a predominant objective of the trial process.

The Supreme Court of Canada declined to resolve this uncertainty in law. The Court observed how in 1975* they had reiterated the discretionary power of trial judges "to exclude evidence obtained in a way that violates a principle of adjudicative fairness or fair treatment of the accused at the hands of police, notwithstanding the otherwise reliable nature of such evidence". They are in the best position to judge the need for excluding evidence on those bases. Consequently the Court did not decide whether the statement was properly excluded by the trial judge. Also this matter was pre-empted by the second defence issue raised in regard to the accused waiving her right to counsel while questioned by police.

The defence argued that the accused's right to counsel was violated when police extracted from her the "intoxicated confession". To determine whether or not this right was infringed, adjudicative fairness is the sole issue. "Probative value" of the evidence is of no consequence in such determination. Therefore the awareness not only of the right to counsel but also of the consequences of what a suspect says is "crucial". The constitutional provision is there to create fair treatment of an accused and a waiver (what the accused's rejection to get counsel amounted to) must be carefully considered. U. S. cases stipulated that there must be a full understanding of the implications before it can be said that an accused had knowingly and intelligently waived the constitutional right to counsel. This means being aware of the legal specificities. Apparently not wanting to go that far, the Supreme Court of Canada in response to this defence submission said:

> Whether or not one goes as far as requiring an accused to be tuned in to the legal intricacies of the case before accepting as valid a waiver of the right to counsel, it is clear that the waiver of the s. 10(b) right by intoxicated accused must pass some form of 'awareness of consequences' test".

* Hosan v. The Queen [1975] 2 S.C.R. 574.

In this case that test was applied by the trial judge and it failed. Police should have waited with the questioning of the accused until she was sober so she could have given proper consideration to the options the right to counsel afforded her.

Accused's appeal allowed.

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ROADSIDE SOBRIETY TEST - RIGHT TO COUNSEL

Regina v. Pinkowski, County Court of Vancouver, Vancouver Registry No. CC851966, May 1986.

A police officer noticed the accused's car veering across the center line of the road. This resulted in the car being pulled over, production of driver's licence, failure of a few standard sobriety tests (finger to nose, etc.), arrest for impaired driving and the accused being informed of his right to counsel.

The accused gave two samples of breath upon demand which indicated a blood alcohol level of 220 mlg. of alcohol per 100 ml. of blood. Three and one half hours after giving the first sample the accused was released and he went directly to a hospital demanding that a sample of his blood be taken. The hospital staff would not comply unless there was consent from police. This was denied by the officer who had booked the accused.

The accused appealed his conviction of "over 80. mlg." claiming that his right to counsel and his right to be presumed innocent until proven guilty had been infringed. The officer had not made him aware of his right to counsel until he was arrested. The accused claimed he was in the circumstances "detained" long before the arrest was effected and should have been informed of his right at least before the roadside sobriety test. Secondly the refusal by police to consent to a blood test had affected his right to be presumed innocent.

The Court responded to have "serious doubts" that what happened before the arrest would constitute detention, as meant in the Charter. Furthermore, even if the accused's version of detention would be correct in these circumstances, the reputation of the administration of justice would not be brought into disrepute if the evidence was admitted. Also, the Court wondered if police consent has any bearing on the taking of a bloodsample at the hospital. Surely police are not responsible for hospital policy or for what hospital staff may do.

Accused appeal dismissed
Conviction upheld.

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LEGAL TID-BITS

Issue of "Voluntariness" re the Making of a Compulsory Declaration

The Federal Fisheries Act compels captains of fishing vessels to make, upon demand, an accurate statement about the fish caught, bought, packed or canned along with other details about the vessel and its crew. A Mr. Gaugh was charged with failing to give such a statement accurately. The trial judge had conducted a voir dire on the admissibility of the declaration Mr. Gaugh had made and had concluded it was not made voluntarily and therefore inadmissible in evidence. Furthermore the trial Judge held that the evidence was inadmissible as the fisheries officials had not made Mr. Gaugh aware of his right to counsel. In view of the many requirements to supply accurate information under various laws, one can imagine the potential impact of a ruling of this kind. The Crown did appeal the acquittal of Mr. Gaugh. In regards to declarations, the Ontario Court of Appeal had held in 1973 that even though one is compelled by law to make a statement improprieties may still occur and a voir dire should still be conducted. For instance someone could be intimidated to say that he was the driver of a car and then be obligated to make declarations under motor vehicle laws incumbent on drivers. The Alberta Court of Appeal held the opposite a year later and said that when one is by law obligated to make a statement, that statement is indeed made involuntarily but is admissible in evidence. If that was not so, common law would supersede statute law. In this Gaugh case, the Nova Scotia Court of Appeal held that the trial judge had been mistaken. The making of the very statement is the gravamen of the offence charged. It is an offence one must intend to commit and the Crown need not prove that the statement was made voluntarily. In respect to "right to counsel" the Court held that Mr. Gaugh was not under arrest or detained and therefore his rights were not infringed. Crown's appeal was allowed and the trial judge was ordered to admit the statement in evidence and continue the trial.

Regina v. Gaugh, 23 C.C.C. (3d) 279.

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Burden on Accused to Prove Infringement of Right or Freedom

Police demanded breath samples of the accused and the results of analyses showed a blood alcohol content in excess of "80 mlg.". He had not been informed at any time of his right to counsel. The accused did not raise this issue during his trial and was convicted. He appealed and argued that constitutional infringement successfully and was acquitted. The Crown took the matter to the Alberta Court of Appeal which restored the conviction. The Court of Appeal held that the burden of proof that there was an infringement was on the accused when he was tried and not on the Crown.

Regina v. Roach, 23 C.C.C. (3d) 262.

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Executing Search Warrant While no one is at Home

Police had a search warrant for a dwelling house in regard to unregistered handguns. No one was home and police entered forcibly. The warrant was good for 10 days and there were no urgent or critical circumstances which justified immediate action. Weapons were seized and the accused petitioned a superior court to quash the warrant and declare the resulting evidence to be inadmissible. The Manitoba Queen's Bench allowed the petition. The Justice held that the residence could have been kept under surveillance and the warrant should have been executed when someone was home. Police had flagrantly invaded a private home. The police action had amounted to unnecessary abuse of authority. The search was hence unreasonable and contrary to s. 8 of the Charter.

Re McGregor and The Queen, 23 C.C.C. (3d) 266.

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Unreasonable Search by Tavern Manager of a Customer

A stubborn drinker returned to the tavern after he had been ejected because he could not prove his age. Being curious if the customer was "under age" the manager searched him after having technically effected an arrest. A small quantity of marihuana was found and the Crown preferred a charge of "possession". The accused argued that the search had infringed his rights to be secure against unreasonable searches and submitted that the evidence should be excluded. The Alberta Court of Queen's Bench held that the Charter applied to the manager and excluded the evidence. The Crown appealed arguing that the manager was not an agent of the government and therefore the Charter did not apply to him. The Alberta Court of Appeal did not rule whether the Charter applies to everyone but held that when a citizen makes an arrest he is exercising a right or performing a duty derived from "the sovereign himself". Therefore the act is one in obedience to the law and the person effecting the arrest is in those circumstances an arm of the state. In other words the manager exercised a governmental function. A search upon arrest is the right of the person who makes it, provided the search is reasonable. In this case that part of the search by which the marihuana was discovered was conceded to be one of curiosity to see if the person the tavern personnel believed to be under age, was indeed as they suspected. That was unreasonable and not within the law that justifies searches upon arrest. The evidence had been justifiably excluded and the Crown's appeal was dismissed.

Regina v. Lerke, 24 C.C.C. (3d) 129 - See also page 12 of Volume 19 of this publication.

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Youths Escaping from "Open Custody"

Several youths were sentenced to serve a period of open custody. They lived in a cottage in an open setting on the grounds of an institution properly designated by the provincial government. Prior to the expiration of the sentence they climbed over the fence and left the premises. They were charged with "escape lawful custody" but the Youth Court found that "open custody" is not included in "custody" as mentioned in s. 133(b) of the Criminal Code. The Ontario Court of Appeal reversed this interpretation and held that one can be imprisoned without being confined in a prison. When the youths took their premature leave from the institution to which they were sentenced they did in fact, escape a lawful custody.

Regina v. B.D. et. al., 24 C.C.C. (3d) 187.

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Self crimination - Admissibility of Statement

The accused used a stolen credit card to defraud his employer. He was questioned at his home and admitted to have used the card to make up phoney invoices. The investigators then arrested the accused and warned him in regard to his right to remain silent and to retain and instruct counsel. Appealing his conviction of fraud and forgery the accused claimed that his statement prior to the warning should be excluded. Failure to inform him of his right to remain silent and his right to counsel before the questionning began amounted to infringements of those very rights. The Ontario Court of Appeal disagreed and reasoned that the accused was not detained when questioned at his home and there was no obligation to inform him of his right to counsel. In respect to the right to remain silent the court held that there is no constitutional or statutory obligation (other than for young offenders and during certain court proceedings) to inform a suspect of that right. The sole consideration for admissibility of the statement was voluntariness. There was no evidence that the accused was in any way made to believe that he was obligated to answer the investigators' questions. The statement was admissible and the accused's appeal was dismissed.

Regina v. Esposito, 24 C.C.C. (3d) 88.

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Enforcing a Repealed Regulation - Lawful Performance of Duty

Alberta changed their regulations in respect to classes of driver's licences. A police officer who was unaware of the change ticketed a driver a few days later for having the wrong driver's licence, while in fact the licence was under the amended regulations valid for the vehicle the accused drove. When serving the summons/ticket at the scene the officer was obstructed and the accused consequently convicted accordingly. He appealed, reminding the Alberta Court of Appeal of a recent decision by the Supreme Court of Canada* which held that peace officers only act lawfully if they act in the exercise of authority which is either conferred by statute or "derived as a matter of common law from their duties".

The Crown in turn, reminded the Court of another Supreme Court of Canada** decision in 1975 where it held that acquittal does not necessarily invalidate an arrest or causes an officer not to have been in the lawful performance of duty when he effected the arrest for the offence of which the accused was subsequently acquitted. As long as it was apparent to the officer at the time he made the arrest that the accused committed the offence. The Alberta Court of Appeal held the two cases were totally distinct from one another and the case the Crown relied on had no relevance at all. Police in that case had reason to believe the person had committed an offence known to law. In this case police had a misconception of what the law was and made the arrest in light of that erroneous belief.

Ignorance of the law does not excuse the offender, neither can it validate the enforcement by an authority of non-existent law.

Appeal was allowed and conviction was set aside.

Regina v. Houle, 24 C.C.C. (3d) 57.

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* Regina v. Dedman, 20 C.C.C. (3d) 97 - Also page 17 of Volume 22 of this publication.

** Regina v. Biron, 23 C.C.C. (2d) 513 - Also see page 32 of Volume 16 "House Party - Creating Disturbance - Obstructing Police".

Possession of a Stolen Car - Presumption of Knowledge - Admissibility of Refusal to Take a Polygraph Test

The accused's fingerprint was found in a car that had been stolen. He readily admitted to have been in a car of similar description which friends had in their possession. He denied any knowledge that the car had been stolen or that he had driven it. He demanded the opportunity to answer those questions while connected to a polygraph. Later, however the accused refused to submit to a polygraph test. The trial judge had held that in the circumstances the accused ought to have known that the car had been stolen. By his own admission to police, he had occupied the driver's seat while the key was in the ignition. This meant he had possession of the stolen car. In regards to knowledge the presumption created by the "doctrine of recent possession" was also applied. The explanation he gave had not been believed, therefore, it was presumed he had knowledge the car was stolen. The trial judge had also admitted in evidence the accused's refusal to take a polygraph test and had drawn an inference from it that was adverse to the accused. The Nova Scotia Court of Appeal upheld the reasoning of the trial judge in regard to recent possession. It also held that since the accused in his statement and also during his trial had referred to his offer to take a polygraph test, the Crown had no alternative but to explain why no such test was taken. Therefore the evidence of refusal was appropriately admitted and a judge or jury may draw inferences from such evidence as from any other evidence.

Regina v. Smith, 24 C.C.C. (3d) 49

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Routine Vehicle Check - Arbitrary Detention

The sole purpose for stopping the accused was to conduct a "routine vehicle check". It was then learned that the accused drove while disqualified under provisions of the Saskatchewan Vehicles Act and he was convicted accordingly. In his appeal the accused argued that police had no justifiable cause to stop him and had therefore arbitrarily detained him. By means of this infringement of his right, police had obtained the evidence supporting the charge of driving while disqualified. Consequently the evidence should be excluded and an acquittal ordered. In the Therens* case the Supreme Court of Canada said that detention means "a restraint of liberty of varying duration other than arrest in which a person may reasonably require the assistance of counsel" or "police assuming control over the movement of the person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel". However, in the Dedman** case the same Court held that from the common law duties of police flowed the duty to control traffic on public roads. The accused stopped and identified himself in compliance with directions the officer was authorized to give. Therefore, the routine check in this case was not unjustifiable use of power and the accused was not arbitrarily detained held the Saskatchewan Court of Appeal.

Regina v. Iron, 24 C.C.C. (3d) 307

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* Regina v. Therens, 18 C.C.C. (3d) 481 - Page 1, Volume 21 of this publication.

** Dedman v. The Queen, 20 C.C.C. (3d) 97 - Page 17, Volume 22 of this publication.

Right to Counsel and Right to be Informed upon "Roadside Demand"

A Mr. Drapeau in Nova Scotia and a Mr. Burkart in Manitoba each encountered police while driving after having consumed alcohol. Both were demanded to give a sample of breath "forthwith" for a "roadside" test (s. 234.1 C.C.). Mr. Drapeau said "No" and was then arrested for so refusing. Upon that arrest he was for the first time advised of his right to counsel. Mr. Burkart did give a roadside sample. The results of the test led to a demand to accompany the officer and give samples for analyses by means of a breathalyzer. Mr. Burkart was, upon that demand (s. 235 C.C.), informed of his right to counsel for the first time during the entire encounter. He subsequently refused to blow. These gentlemen were charged respectively with refusing under 234.1 C.C. and refusing under s. 235 C.C. Eventually these cases ended up in the Nova Scotia and Manitoba Courts of Appeal with Mr. Drapeau and Mr. Burkhart both arguing that they should have been informed of their right to counsel when demanded to give a sample of breath for the roadside test. The Supreme Court of Canada in the now well known Therens decision, declined to say that there was a distinction between a demand under s. 234.1 and s. 235 C.C. in terms of "detention". If a demand under 234.1 C.C. then results in detention the suspect must, in accordance with the Charter, be informed of his right to counsel. This was not done in either case, therefore the infringement of that right ought to have resulted in consideration for the exclusion of the evidence of the refusals submitted Messrs. Drapeau and Burkart each to his own provincial Court of Appeal. An alternative remedy was to declare the compelling "forthwith" compliance with a demand under 234.1 C.C. inconsistent with the Charter and hence without any force or effect.

The two Courts of Appeal responded similarly and held that despite the fact that a demand constitutes detention, the limitation the word "forthwith" in s. 234.1 C.C. places on a person's right, the measures it impliments to protect the public are "demonstrably justified in our free and democratic society" (see s. 1 of the Charter). Both accused lost their argument and their appeals were dismissed.

Regina v. Drapeau, 23 C.C.C. (3d) 376 (Nova Scotia)
Regina v. Burkart, 24 C.C.C. (3d) 32 (Manitoba)

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Possession of Prohibited Weapon

The accused, dressed in punk fashion wore a "spiked wristband". He was charged with possession of a prohibited weapon and was acquitted in the Ontario provincial court. The trial judge had said that despite section 82(1)(c) of the Criminal Code and the "Order of the Governor in Council" declaring a "spiked wristband" a prohibited weapon, the accused could not be convicted unless the Crown also showed in compliance with the definition of "weapon" in the Criminal Code, that the band was "designed to be used as a weapon" OR was intended to be used as one. The accused wore and possessed the wristband, notwithstanding its peculiarity, as fashionable jewellery. When the County Court agreed with the trial judge's views, the Crown took the matter to the Ontario Court of Appeal. Weapon is defined as (a) anything designed to be used as a weapon OR (b) anything a person intends to use as a weapon whether or not it was designed to be used as a weapon. The Court observed that (a) is an ojective definition and (b) a subjective one, and the word OR makes the two disjunctive. The trial judge had made the definition in (a) (anything designed to be used as a weapon) subordinate to (b) (the intended use of anything as a weapon). As the trial judge had failed to appropriately apply those two separate definitions to the evidence before him, the Crown's appeal was allowed and a new trial was ordered.

Regina v. Murray, 24 C.C.C. (3d) 568.

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Equality Before and Under the Law

S. 542(2) C.C. provides that a person who has committed an indictable offence and who has been found not guilty by reason of insanity must at the pleasure of the Lieutenant Governor in Council, be kept in strict custody. This means indefinite custody. Any other person who is acquitted is free to go where he pleases. This means that the provisions in s. 542 C.C. is discriminatory and violates s. 15 of the Charter, the B. C. Court of Appeal was told by a defence lawyer. His client was committed on account of having been found not guilty due to insanity at the time he threatened to use a weapon while committing an assault (s. 245.1(1)(a) C.C.). The B. C. Court of Appeal, in essence, responded that likes should be treated alike. All persons who are "not guilty" on account of insanity while committing an indictable

offence are treated the same. The distinction is that other acquittals are on the basis of a person being legally innocent in that it was not proven they did commit the crime or they had a legal justification or excuse to commit the act. S. 542(2) deals with persons who were by legal process found to have committed the alleged crime. The acquittal is on account of a mental condition and that places those covered under the disputed section in a different position.

Between Mark K. Rebic and the Attorney General for B. C., Vancouver Registry, CA 004215, May 1986.

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Is a Spouse who is a Competent Witness also Compellable?

A Whitehorse woman stayed out dancing and drinking until early morning hours. When she arrived home an argument with her common law husband escalated in a wrestling match. The wife broke loose and made it to the kitchen where she armed herself with a meat cleaver. She then attacked her husband, wounding him severely which resulted in a conviction of assault causing bodily harm.

Just before the trial the common law couple (combatants) were married. When the Crown called the husband (victim) as the first witness, it was submitted that he preferred not to testify against his now legal spouse. It was argued that s. 4 of the Evidence Act renders a spouse only a competent witness but not a compellable one. The trial judge had rejected that submission and the trial resulted in a conviction. The accused appealed.

The Yukon Court of Appeal (B. C. Court of Appeal) agreed with the trial judge and dismissed the appeal.

Regina v. McGinty, Court of Appeal of the Yukon Territory, CA Y22/85, May 1986.

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Taking Wood from the Wild - Theft from Province of B. C.

The accused went to the woods and got himself some firewood. He had done so with his father some years ago and had seen others do it. The grounds from which he took the wood was part of a provincial park and he found himself charged with theft of wood the property of the province of B. C.

The accused claimed that the theft, in the circumstances and particularly in view of his reasonable presumption that there was an implied permission to take the wood, was not carried out fraudulently without colour of right. The latter, of course, are the prerequisites to rendering the taking of the wood a culpable act. The Court did not buy the defence arguments. The accused had made absolutely no enquiries while he knew that someone owned what he took. He had been totally indifferent and blind to what he ought to have realized and did know. The judge of the County Court of Vancouver Island convicted the accused.

Regina v. Lover, Port Alberni Registry, C.R. 214, January 1986.

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Sharing Apartment Used to Store Contraband - Possession

The accused shared an apartment with another tenant. Police conducted a search of the premises and found in various places large quantities of marihuana and paraphernalia indicating that the narcotic was not simply for personal use. The accused, when tried for possession of the narcotic, argued that the Crown had failed to prove she possessed the marihuana. In view of the large quantity, the County Court of Vancouver held that it would be stretching one's credulity to say that she as a tenant, was unaware of the marihuana in the apartment. Perhaps she did not have exclusive possession but she did have possession as defined in s. 3(4) C.C.

Regina v. Mar, Vancouver Registry CC851354, December 1985.

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Moving Rail Switch - Criminal Negligence

Despite the discouragement of his companions, the accused (a 19 year old youth) smashed the lock on a railroad switch and placed it in a setting that would cause a passing train on the main track to go on a siding which was occupied by loaded freightcars. A train came along approximately 1 1/2 hours later. The engineer saw the switch in the wrong position but could not stop. The train collided with the stationary freightcars and the engineer was very seriously injured. The damage was in excess of two million dollars. The accused was charged with criminal negligence causing bodily harm. He submitted in his defence that: (a) he had no intent to cause such harm; and (b) he "thought" he left the switch in the position he had found it in and that someone may have come along afterwards who placed it in the position that had caused the accident.

In response to (a), the County Court held that when Criminal negligence is alleged the Crown need only to show intent for the act or omission, not the consequences of that act. In regards to (b), the Court considered the notion that someone equally mischievous as the accused would come walking along the same track (which as far as pedestrian traffic is concerned is abandoned) as no more than speculation and conjecture.

Accused convicted.

Regina v. Robins, County Court of Cariboo, Williams Lake Registry No. 06620, December 1985.

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Inexperienced officer making Suspect Aware of Right to Counsel too Late

A demand was made of the accused to give samples of his breath. Apparently, no arrest was effected and the accused accompanied the officer as per the demand. No warnings as to right to remain silent or right to counsel were given. When at the police station, before giving a sample of his breath the accused was supplied with a telephone and told he had a right to retain counsel without delay. The accused declined to use the phone and he gave the samples required from him. When in cross examination the officer was asked why he had not given the standard warnings he responded to be "relatively inexperienced" and had not thought it necessary. The accused appealed his conviction of over "80 mlg.". The Vancouver County Court held that there was nothing flagrant or deliberate about the policeman's actions. Neither had there been any adverse affects on the accused. It was not a case where it could be said that the officer flouted the law or that the administration of justice would be adversely affected.

The accused's appeal was dismissed.

Regina v. Taylor, Vancouver County Court, No. C.C. 860364, June 1986.

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